No. 75-1138

In the Supreme Court of the United States

OCTOBER TERM, 1975

JOHN ELWYN PROTHRO, SR., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINION BELOW

The order of the court of appeals (Pet. App. A) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on December 10, 1975, and a petition for rehearing was denied on January 14, 1976 (Pet. App. B). The petition for a writ of certiorari was filed on February 11, 1976. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the evidence was sufficient to establish a violation of 18 U.S.C. 1001.

2. Whether the testimony of an FBI agent should have been excluded under the Jencks Act because he destroyed his rough notes of an interview with petitioner, even though the final typewritten report of the interview was furnished to defense counsel.

STATUTES INVOLVED

The relevant statutes, 18 U.S.C. 1001 and 3500, are reproduced in pertinent part at Pet. 2-3.

STATEMENT

In 1968 and 1969, petitioner was the principal developer of two Texas construction projects, the Casa Grande Apartments and the South Point Mobile Home Park. His conviction arose out of his application to the Department of Housing and Urban Development (HUD) and the Federal Housing Administration (FHA) for mortgage insurance on the two projects. By overstating the costs incurred in acquiring the sites, petitioner had obtained funds substantially in excess of those to which he was legally entitled.

The evidence at trial showed that in late 1968 or early 1969 petitioner purchased, for approximately $2,000 an acre, a 32-acre tract of land for the construction of the Casa Grande Apartments. Approximately four months later, petitioner purported to transfer the property to Murph Wilson, a business and personal associate; Wilson signed an agreement purporting to transfer the property back to petitioner for $21,780 per acre (Tr. 24, 31, 34, 38-39, 56-57). In fact, Wilson neither paid money for the property when it was conveyed to him nor received any consideration when he later transferred the property back to petitioner (Tr. 80).

In December 1969, petitioner obtained an option from Citizens First National Bank to purchase a 92-acre

parcel of land for $1,000 per acre for the construction of the South Point Mobile Home Park (Tr. 127-129, 154). He thereafter executed an agreement between himself and one of his partners, Anthony Howard, which represented that Howard was the seller of the land and that the purchase price was $300,000 rather than the actual $91,000. Howard never had title to the property, nor did he receive any consideration for signing the agreement (Tr. 172-178).

As evidence of site control and cost of acquisition of the properties, petitioner submitted to the FHA the Wilson and Howard agreements along with a Feasibility Application. FHA then made its own appraisals of the two sites and valued the Casa Grande site at $294,500 in its unimproved condition and the South Point Park site at $235,200 (Pet. App. D-7, D-15). FHA approved petitioner's application and issued commitments to insure the mortgages on the two projects.

The agency determined that the total funding required to complete the Casa Grande and South Point Park projects was, respectively, $235,930 and $139,333 (Pet. App. D-10, D-16), and the agency paid those amounts to petitioner at the initial closings.[1] Under FHA regulations, however, the maximum amount to which petitioner was entitled was the lesser of FHA's appraisal of the value of the land and petitioner's actual acquisition costs (Pet. App. D-11); petitioner's actual acquisition costs were $65,414 and $91,000. Thus, petitioner was entitled only to those amounts and not to the greater amounts that

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[1]The amounts paid petitioner were calculated according to FHA regulations. They represented the difference between the FHA appraised value and the maximum insurable mortgage on each project (see Pet. App. D-10).

he obtained as a result of his overstatement of the costs of acquisition.

After a jury trial in the United Stated District Court for the Northern District of Texas, petitioner was convicted on two counts of concealing a material fact within the jurisdiction of an agency of the United States, in violation of 18 U.S.C. 1001. He was sentenced to three years' probation and fined $10,000. The court of appeals affirmed without opinion (Pet. App. A).

ARGUMENT

1. Petitioner contends (Pet. 5-9) that the evidence was insufficient to establish a violation of 18 U.S.C. 1001. The evidence was, however, sufficent to support the jury's finding of guilt. *Glasser* v. *United States*, 315 U.S. 60, 80.

a. Petitioner first asserts (Pet. 5) that there was no "concealment" on his part within the meaning of the statute, because he allegedly disclosed the purchase price of the properties to an FHA official at two preliminary "prefeasibility conferences." But testimony at trial established that the FHA prefeasibility conference is an informal proceeding, the only purposes of which are to discuss a proposed project in general terms and to determine whether funds are available and, if so, whether the application process should be initiated (Tr. 449-451). The conference occurs before any file has been established by FHA (Tr. 904) and before the submission of the Feasibility Application (Form 2013). If the FHA Director believes that a project is viable, he will invite the filing of an application (Tr. 451). However, no FHA file comes into existence unless a specific application is submitted.

Norman Nelson, the attorney who represented petitioner in his dealings with the FHA, testified that petitioner

disclosed the actual purchase prices of the land sites to FHA official Ed J. Dee at the prefeasibility conferences (Tr. 855-857, 877-878).[2] However, these disclosures do not disprove concealment because, in the formal applications that petitioner later presented—the first documents to become a part of petitioner's FHA file—petitioner misstated and concealed the true cost.[3] Moreover, by filing the agreements signed by Wilson and Howard, petitioner successfully concealed from the officials responsible for disbursements of funds that he had acquired the properties at much lower prices.[4]

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[2]Nelson testified that when Dee asked petitioner at the conference on the Casa Grande project, held in the summer of 1969, what he had paid for the property, petitioner responded that he had got it for a steal at $2,000 an acre (Tr. 855-857). Nelson further testified that at the conference held on the South Point Park project in February 1969, petitioner told Dee that the land had cost $1,000 an acre but was worth a lot more (Tr. 877-878).

[3]The cases upon which petitioner relies for his argument that Dee's knowledge should be imputed to the FHA are inapposite. In *United States* v. *Shelby Iron Co.*, 4 F.2d 829, 832 (C.A. 5), reversed and remanded, 273 U.S. 571, the knowledge imputed to the agency was imparted to an agency official through a formal clause in a government contract. In *United States* v. *Hanna Nickel Smelting Co.*, 253 F. Supp. 784, 794-795 (D. Ore.), the government officials were under a duty to convey to their superiors the knowledge which the court imputed to the agency. In *United States* v. *Long*, 14 F. Supp. 29, 30-31 (D. Mass.), there was no concealment of information from agency officials.

[4]Contrary to petitioner's related claim (Pet. 5-6), the jury properly could find on the evidence before it that the concealment was effectuated by a "trick, scheme, or device," within the meaning of the statute. Petitioner got Wilson to sign an agreement purporting to transfer the Casa Grande property back to petitioner at an inflated price, when in fact Wilson never paid or received money for the property, and petitioner then submitted this agreement to FHA as evidence of the cost of acquisition of the property. By this "trick, scheme, or device", he concealed from FHA the

b. Petitioner argues (Pet. 6-7) that the evidence was insufficient to prove intent to conceal because there was no evidence that he was familiar with the applicable FHA regulations and procedures. However, the jury was correctly instructed on the *scienter* required for a conviction under the statute (Tr. 1056-1057, 1063, 1065), and there was ample evidence to warrant its conclusion that petitioner did not enrich himself through accident or inadvertence.

As petitioner concedes (Pet. App. D-1), the attorney with whom he coordinated these ventures was "experienced in FHA matters." Moreover, petitioner himself negotiated with the original owners of the properties used for the two projects. He caused the Casa Grande property to be deeded to Wilson, and he prepared the agreements that he induced Wilson and Howard to sign.

c. Petitioner also claims (Pet. 7-9) that his acquisition cost was not a material fact and, hence, that its misrepresentation was not illegal. However, the requirement of materiality does not mean, as petitioner suggests (Pet. 7-8), "that a concealed fact actually pervert the function of a governmental agency." Rather, the test is whether the false statement has a natural tendency to influence, or was capable of influencing, the decision of the tribunal in making a determination required to be made. *Weinstock* v. *United States*, 231 F.2d 699, 701 (C.A.D.C.); *United States* v. *Krause*, 507 F.2d 113, 118 (C.A. 5);

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fact that he had already gained control of the property independently of this agreement at the cost of only $2,000 per acre, rather than the $21,780 per acre indicated by the agreement with Wilson. Petitioner used a similar "trick, scheme, or device" in filing the agreement signed by Howard to conceal from FHA the true cost of the South Point Park property.

United States v. *East*, 416 F.2d 351, 353 (C.A. 9). It is not necessary that the government agency actually be influenced by the false statement or concealment (*United States* v. *Gonzales*, 286 F.2d 118, 122 (C.A. 10)), or that the government actually rely on the statement or concealment (*Blake* v. *United States*, 323 F.2d 245, 247 (C.A. 8)).[5]

In any event, petitioner's submission of the inflated cost figures did affect the government's functions. First, HUD was denied the opportunity of reviewing FHA appraisals that exceeded the cost of acquisition to the developer.[6] Second, both the funds paid to petitioner at the initial closings and the value of the insurance liability HUD incurred far exceeded the amounts for which the government would have been responsible had petitioner's Feasibility Application not concealed his true costs. See pp. 3-4, *supra*.

2. Petitioner claims (Pet. 9-11) that the trial court erred in refusing to exclude the testimony of FBI Agent Wilton Bremer because Bremer, following standard FBI practice, disposed of his rough notes of an interview with petitioner and refreshed his recollection by referring

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[5]*Tzantarmas* v. *United States*, 402 F.2d 163, 168 (C.A. 9), certiorari denied, 394 U.S. 966, and *United States* v. *East*, *supra*, upon which petitioner relies, likewise hold that the test of materiality is whether the falsification *could* affect or influence governmental functions.

[6]Petitioner concedes that under FHA procedures a discrepancy between appraised value and sponsor acquisition cost requires additional documentation and explanation (Pet. 8).

to the final typewritten report he had prepared from those notes.[7]

While it is theoretically possible that the rough notes of an FBI agent might in some circumstances be a Jencks Act "statement" within the meaning of 18 U.S.C. 3500(e), such was not the case here. Petitioner concedes (Pet. 10, n. *) that the notes were not his own substantially verbatim oral statements, producible under 18 U.S.C. 3500(e)(2), nor were they a factual narrative account written by petitioner himself, producible under 18 U.S.C. 3500(e)(1). For all that appears in the record, the notes constituted no more than an incomplete summary of an interview with petitioner, written by the agent, and they were therefore not producible under the Jencks Act. *Palermo* v. *United States*, 360 U.S. 343, 350-351. The fact that Agent Bremer compared his final report with the notes "for accuracy" (Pet. 10, n. *) is no indication that petitioner "adopted" or "approved" the notes within the meaning of 18 U.S.C. 3500(e)(1).[8] Nor does that fact transform the agent's rough notes of what petitioner told him into a written statement of the agent himself.

As the Court stated in *Killian* v. *United States*, 368 U.S. 231, 242:

> If the [FBI] agents' notes * * * were made only for the purpose of transferring the data thereon to the receipts * * * and if, after having served that purpose, they were destroyed by the agents in good faith and in accord with their normal practice, it would be clear that their destruction did not constitute an impermissible destruction of evidence nor deprive petitioner of any right.

See also *United States* v. *Augenblick*, 393 U.S. 348, 355-356. Accordingly, the Jencks Act did not require preservation and production of the agent's rough notes.[9]

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[7]Bremer's interview with petitioner occurred on September 25, 1972. His final report was prepared four days later (Tr. 595-596), and was furnished to defense counsel at or before trial (Tr. 564-566).

At trial, Bremer testified that, during the interview, petitioner admitted to him that Howard was his partner and that he had asked Howard to sign the agreement reflecting a price of $300,000 in order to establish a basis in the land so that the project might be sold to a local investor at a profit (Tr. 587). Petitioner further stated in the interview that he had in fact purchased the land for $1,000 an acre, and that the $300,000 figure was used in order to obtain an operating cushion or contingency money (Tr. 586, 588).

As to the Casa Grande project, petitioner told Bremer that he had purchased a 32-acre tract for approximately $65,000, and had deeded the land to Wilson (Tr. 589-590). Petitioner stated that no consideration passed between himself and Wilson for the land and that his reasons for using the option, reflecting a price of $21,780 per acre, were the same as those in the South Point Park project (Tr. 591).

[8]"[D]iscussions of the general substance of what the witness has said do not constitute adoption or approval of the [interviewer's] notes within §3500 (e)(1), which is satisfied only when the witness has 'signed or otherwise adopted or approved' what the [interviewer] has written. This requirement clearly is not met when the [interviewer] does not read back, or the witness does not read what the [interviewer] has written." *Goldberg* v. *United States*, No. 74-6293, decided March 30, 1976, slip op. 15-16, n. 19. See also *id.*, concurring slip op. 1-4 and n. 2 (Stevens J.); *id.*, concurring slip op. 9-11 (Powell, J.).

[9]Petitioner's reliance upon *Jencks* v. *United States*, 353 U.S. 657, for the proposition that he "was entitled to the handwritten notes under the due process guaranteed him by the Fifth Amendment" (Pet. 10), is misplaced. As the Court has made clear, the *Jencks* rule is not of constitutional dimension. *United States* v. *Augenblick*, *supra*, 393 U.S. at 356; *Scales* v. *United States*, 367 U.S. 203, 258; *Palermo* v. *United States*, *supra*, 360 U.S. at 345.

A few courts have disapproved the FBI's practice of not preserving agents' rough notes of witness interviews,[10] but no court has held that the destruction of rough notes in accordance with established practice requires suppression of the agent's testimony, and seven circuits have held to the contrary.[11] While a panel of the District of Columbia Circuit recently stated in *dicta* that in the future it will impose sanctions for the FBI's failure to preserve rough notes of witness interviews, it affirmed the convictions in the case before it. *United States* v. *Harrison,* 524 F.2d 421, 434-435 (C.A. D.C.). [12] Although

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[10]See *United States* v. *Missler,* 414 F.2d 1293, 1304-1305 (C.A. 4), certiorari denied, 397 U.S. 913; *United States* v. *Thomas,* 282 F.2d 191, 194 (C.A. 2); but see *United States* v. *Covello,* 410 F.2d 536, 545 (C.A. 2), certiorari denied, 396 U.S. 879.

[11]See cases collected in *United States* v. *Harrison,* 524 F.2d 421, 429-432 and n. 25 (C.A. D.C.) The cases on which petitioner relies for his argument that Bremer's testimony should have been suppressed for failure to produce his rough notes are inapposite. In both *United States* v. *Sheer,* 278 F.2d 65, 67 (C.A. 7), and *United States* v. *McCarthy,* 301 F.2d 796, 797 (C.A. 3), the defense was denied access not to the government agent's rough notes but to the agent's written report. *United States* v. *Lonardo,* 350 F.2d 523, 529 (C.A. 6), involved the destruction of a stenographic transcript of a witness' statement where the defendant had not been furnished the final report or otherwise provided with the information contained in the statement. In *United States* v. *Johnson,* 337 F.2d 180, 202 (C.A. 4), affirmed and remanded, 383 U.S. 169, the court held that the FBI agents' notes of interviews did not qualify as a statement within the meaning of the Jencks Act.

[12]The panel in *Harrison* expressed the view that FBI agents' rough notes were "potentially discoverable materials" under *Brady* v. *Maryland,* 373 U.S. 83, and that the failure to preserve them should result in the exclusion of testimony (524 F.2d at 434-435).

actual imposition of a sanction may create a conflict requiring resolution by this Court, at present review of the issue raised by petitioner would be premature.[13]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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[13]Petitioner's suggestion (Pet. 9) that Agent Bremer's final report was unreliable or distorted is unsupported. The fallacies in the report to which petitioner refers were not more than typographical errors that in no way affected the report's reliability. The "substantial editorial notes" were penciled underlinings and notations, consisting primarily of form numbers and dates, which Bremer testified he had made in the week prior to trial in preparation for trial (Tr. 642-645). In the changed sentence to which petitioner refers, the word "no" was penciled in because it had been omitted inadvertently (Tr. 603, 662). Indeed, the fact that petitioner was able to engage Bremer in a detailed cross-examination based on the agent's typewritten report shows both that petitioner suffered no prejudice because the rough notes were unavailable and that the letter and purpose of the Jencks Act were fully satisfied.

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